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 LOS ANGELES TURF CLUB, INCORPORATED,  
 LOS ANGELES TURF CLUB II, INC.,  
 PACIFIC RACING ASSOCIATION, PACIFIC RACING  
 ASSOCIATION II, GULFSTREAM PARK RACING  
 ASSOCIATION, INC., OREGON RACING, INC.,  
 MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC.,  
 and LAUREL RACING ASSOCIATION, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES TURF CLUB, INCORPORATED, a California Corporation, LOS ANGELES TURF CLUB II, INC., a California Corporation, a PACIFIC RACING ASSOCIATION, a California Corporation, PACIFIC RACING ASSOCIATION II, a California Corporation, GULFSTREAM PARK RACING ASSOCIATION, INC., a Florida Corporation, OREGON RACING, INC., a Delaware Corporation, MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC., a Maryland Corporation, and LAUREL RACING ASSOCIATION, INC., a Maryland Corporation,	) No.: 2:15-cv-9332 SJO (JEMx)
	) <b>PLAINTIFFS' SEPARATE</b>
	) <b>STATEMENT OF ADDITIONAL</b>
	) <b>UNDISPUTED MATERIAL FACTS</b>
	) <b>IN OPPOSITION TO DEFENDANT'S</b>
	) <b>MOTION FOR SUMMARY</b>
	) <b>JUDGMENT</b>
	) [Filed concurrently with Opposition to
	) Motion for Summary Judgment]
	) Date Filed: December 3, 2015
	) Discovery Cutoff: March 27, 2017
	) Final Pretrial Conf.: June 19, 2017
	) Trial Date: June 27, 2017
Plaintiffs,	) <b>DATE: April 24, 2017</b>
	) <b>TIME: 10:00 a.m.</b>
vs.	) <b>CTRM: 10C</b>
	)
HORSE RACING LABS, LLC, a Delaware Limited Liability Company, (also known as IMMERSE, LLC), doing	)

1 business as DERBYWARS, and DOES 1 )  
2 through 10, inclusive, )  
3 Defendants. )  
4 )  
5 )

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7 Plaintiffs Los Angeles Turf Club, Incorporated, Los Angeles Turf Club II, Inc.,  
8 Pacific Racing Association, Pacific Racing Association II, Gulfstream Park Racing  
9 Association, Inc., Oregon Racing, Inc., Maryland Jockey Club Of Baltimore City, Inc.,  
10 and Laurel Racing Association, Inc. (collectively, “Plaintiffs”), respectfully submit the  
11 following Separate Statement of Additional Undisputed Facts in support of their  
12 Opposition to Defendant’s Motion for Summary Judgment:

13 **I. ADDITIONAL UNDISPUTED MATERIAL FACTS**

14 The uncontroverted facts listed below as 72 - 135, are also proffered by  
15 Plaintiffs in support of their Motion for Partial Summary Judgment. The evidence  
16 cited in support of Uncontroverted Facts 72 - 128, was previously submitted to the  
17 Court. (Docket Nos. 62 – 62-17). The evidence supporting uncontroverted facts  
18 numbers 129 - 135, is filed herewith.

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**ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT’S ISSUE IA - THAT PLAINTIFFS’ FIRST  
CAUSE OF ACTION FOR ALLEGED VIOLATION OF THE INTERSTATE  
HORSERACING ACT FAILS AS A MATTER OF LAW**

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC (“HRL”) is a Delaware limited liability company, doing business in Louisville, Kentucky.	Deposition of Mark Midland, attached to the Declaration of Richard B. Specter, ( <u>Docket</u> No. 62-4) as Exhibit “A,” ( <u>Docket</u> No. 62-5) (“Midland Depo.”), 16:19-17:11; Answer to First Amended Complaint, ( <u>Docket</u> No. 34), ¶ 11.
73. Defendant operates out of an office building in Kentucky.	Midland Depo., 16:19-17:11; 161:7-12, <u>Docket</u> No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant’s Derby Wars’ website (www.derbywars.com) proclaims: <div style="text-align: center;"> <b>“Horse Racing Handicapping Contests”</b>  <b>“Play for free or real money”</b>  <b>“Pick a horse in each race”</b>  <b>“Over \$20-million paid out in winnings!”</b> </div>	Declaration of Diane L. Ellis (“Ellis Dec.”), ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players’ funds in a bank account consisting only of players’ funds, and when the player	Deposition of Michael R. Shutty, attached to the Declaration of Richard B. Specter ( <u>Docket</u> No. 62-4), as Exhibit

1 enters a contest, his account is deducted	“B,” ( <u>Docket No. 62-6</u> ), (“Shutty
2 by the amount of the wager (the “entry	Depo.”), 112:16-113:24; Midland Depo.,
3 fee”).	168:17-23; 327:15-23, <u>Docket No. 62-5</u> .
4 78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
5 wager (the “prize”), his Derby Wars	No. 62-5.
6 account is credited with his winnings.	
7 The player can thereafter request a	
8 withdrawal from his account, in which	
9 case a check is sent to him from the	
10 Derby Wars account.	
11 79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
12 conduct wagering on horse racing in	<u>Docket No. 62-5</u> .
13 California, Florida, Maryland or Oregon.	
14 80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket No. 62-7</u> ;
15 allowing players to “win real money,”	Midland Depo., 181:22-24, <u>Docket No.</u>
16 and the players do win real money.	62-5.
17 81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket No. 62-7</u> .
18 that are “head-to-head”.	
19 82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket No.</u>
20 entry fee for a fixed prize.	62-5.
21 83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket No. 62-7</u> .
22 players each pay a \$22 entry fee to	
23 compete with each other.	
24 84. The remaining \$4 is the “take out” or	Midland Depo., 220:13-22; 233:6-10,
25 “rake” retained by Defendant.	<u>Docket No. 62-5</u> .
26 85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket No. 62-7</u> .
27 contests with the prize up to \$1,500, with	
28 \$799 entry fees.	
86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket No. 62-7</u> .
players must select horses in 6 to 10	
different races running at various race	
tracks, including Plaintiffs’ tracks.	
87. In the contests, “the scores are	Ellis Dec., ¶ 8, <u>Docket No. 62-7</u> ; and
calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
payouts at actual race tracks”, and are	No. 62-5.
based upon the actual payoff amounts on	
real horse races at real race tracks,	
including Plaintiffs’ tracks.	
88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
	<u>Docket No. 62-5</u> .
89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket No.</u>

1	(the most winnings) at the end of the	62-5.
2	contest, wins the “prize.”	
3	90. Defendant also offers “high stakes”	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
4	contests for up to \$300,000, with a	
5	\$2,200 entry fee.	
6	91. In agreements with third parties,	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7;
7	Defendant even refers to its players as	Exhibit 6, p. 2, “Exhibit 5;” Ellis Dec., ¶
8	“bettors.”	11, Exhibit 7, p. 2, “Exhibit 5;”, Ellis
9		Dec., ¶ 12, Exhibit 8, p. 2, “Exhibit 5.”
10	92. A player is awarded points on the	Midland Depo., 134:6-135:5, <u>Docket</u>
11	same basis as if he had placed a \$2 bet at	No. 62-5.
12	the racetrack, subject to adjustment for	
13	maximum payouts.	
14	93. For instance, if a horse would pay	Midland Depo., 135:18-136:10, <u>Docket</u>
15	\$6.40, the player is awarded 6.40 points.	No. 62-5.
16	95. Derby Wars uses “points or dollars	Midland Depo., 136:6-10, <u>Docket</u> No.
17	interchangeably.”	62-5.
18	96. The player has no influence over the	Midland Depo., 177:21-178:8, <u>Docket</u>
19	actual results of the horse race; at the	No. 62-5.
20	time when the player enters a contest, it	
21	is uncertain as to which horse will win	
22	the race.	
23	97. The winner of the contest will be	Midland Depo., 178:9-13, <u>Docket</u> No.
24	determined by future events.	62-5.
25	98. Many of the races used in the	Midland Depo., 180:12-181:21, <u>Docket</u>
26	contests take place at Plaintiffs’ race	No. 62-5.
27	tracks in California, Florida, Maryland	
28	and Oregon.	
	99. Unlike other sports, horseracing is	Declaration of Scott J. Daruty (“Daruty
	almost exclusively funded by wagering.	Dec.”), ¶¶ 8, 10, <u>Docket</u> No. 62-3.
	100. The total amount wagered is the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
	“handle.”	
	101. By law, approximately eighty	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
	percent of the handle is returned to the	
	patrons who placed winning wagers.	
	102. The remaining approximately	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
	twenty percent is known as the “takeout,”	
	the amount initially retained by the race	
	track.	
	103. The takeout is then divided,	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
	pursuant to contract and law, among the	

1	stakeholders in the form of commissions	
2	paid to the racetracks; purses paid to the	
3	owners, trainers and jockeys of the	
4	horses in the race; taxes paid to the state;	
5	and funds dedicated to equine research,	
6	workers' compensation funds, worker	
7	health and welfare, etc., that benefit the	
8	backstretch workers.	
9	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
10	horseracing includes "Win" (picking a	
11	horse to finish first in the race), "Place"	
12	(picking a horse to finish first or second	
13	in the race) and "Show" (picking a horse	
14	to finish first, second or third in the race).	
15	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
16	Place or Show is called an exotic wager.	
17	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
18	Double" (picking the winning horse in	
19	two consecutive races), "Exacta"	
20	(picking the first two horses to finish in a	
21	single race in the exact order), "Trifecta"	
22	(picking the first three horses to finish in	
23	a single race in the exact order), "Pick	
24	Three" (picking the winning horse in	
25	three consecutive races), "Pick Four"	
26	(picking the winning horse in four	
27	consecutive races), and a "Pick Six"	
28	(picking the winning horse in six	
	consecutive races.)	
	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
	are indeed <b>wagers</b> when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
	racetrack.	
	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	only took place live (at the actual track	
	where the race was being run), such that	
	bettors had to attend the race to place a	
	wager.	
	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers	
	at locations other than the track where	

1	the race was being run.	
2	110. In 1978, Congress enacted the IHA, which was explicitly intended to	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
3	“regulate interstate commerce with	
4	respect to wagering on horseracing.” As	
5	provided therein, no one “may accept an	
6	interstate off-track wager except as	
7	provided in” the IHA.	
8	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
9	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No.
10		62-6.
11	112. From the late 1990’s through today,	Daruty Dec., ¶ 14.
12	the industry has experienced much	
13	growth in the area of Advanced Deposit	
14	Wagering (“ADW”).	
15	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
16	with a licensed, regulated	
17	online/telephone wagering operator, and	
18	then issues wagering instructions (via	
19	telephone or internet) to that operator to	
20	place a wager on a specific race using	
21	funds in the account.	
22	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
23	winning funds are deposited directly into	
24	the customer’s account.	
25	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
26	interstate wagers on horseraces by an	
27	entity (including an ADW operator),	
28	which has obtained consent from, <i>inter</i>	
	<i>alia</i> , the host racing association on whose	
	races such wagers are placed, such as	
	Plaintiffs.	
	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
	required consent only if it receives a	
	payment of money or other value from	
	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	

1	Park and Golden Gate Fields), Florida	
2	(Gulfstream Park and Gulfstream Park	
3	West), Maryland (Pimlico and Laurel	
4	Park), and Oregon (Portland Meadows).	
5	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
6	Association within the meaning of the	
7	IHA.	
8	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
9	host State to conduct racing.	
10	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
11	agreement with its Horsemen's Group, as	
12	required by the IHA.	
13	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
14	consent to Defendant to accept a wager	
15	on a race run at any of Plaintiffs' race	
16	tracks.	
17	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
18	consent to Defendant to accept a wager	
19	from a resident of the States of	
20	California, Florida, Maryland or Oregon.	
21	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
22	money from Defendant with respect to	
23	wagers (or entry fees) accepted by	
24	Defendant	
25	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
26	agreements with any of the Plaintiffs.	
27	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
28	received consent from any Plaintiff to	
	accept wagers on races run at the	
	Plaintiffs' race tracks.	
	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
	received consent of any host racing	No. 62-7.
	commission to accept wagers on	
	Plaintiffs' races.	
	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
	received consent from any off-track	<u>Docket</u> No. 62-7.
	racing association to conduct its contests.	
	129. In response to New York's DFS	Declaration of Diane L. Ellis ("Ellis
	legislation Derby Wars stopped accepting	Dec. Opp. to MSJ"), ¶3, Exhibit A;
	entry fees from residents of New York,	Midland Depo., 353:19-354:5; 485:13-
		25.

130. Every visitor to the Derby Wars website has access to the leaderboards, a display of other participants' selections, and a graphic that displays how many people selected each horse, without paying an entry fee.	Ellis Dec. Opp. to MSJ, ¶6.
131. The prizes offered by Defendant consist of entry fees only; Defendant has no other source of revenue for the Derby Wars contests.	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B; Shutty Depo., 21:17-22.
132. Defendant admits that its business model is that the cash prize in a contest must be less than the cash entry fees.	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A Midland Depo., 149:1-5.
133. When a licensed ADW accepts a wager from a resident of California, Florida, Maryland or Oregon, the host racing association in that state receives a payment as its "Market Access Fee" or "Source Market Fee."	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
134. In October, 2011, HRL launched the DerbyWars.com website.	Midland Depo., 72:3-5, <u>Docket</u> No. 62-5.
135. Defendant admits that that it has continually operated these contests on a daily basis since 2011.	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A, Midland Depo., 124:24-125:1.

**ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT’S ISSUE IB - THAT PLAINTIFFS’ SECOND  
CAUSE OF ACTION FOR ALLEGED VIOLATION OF CALIFORNIA  
BUSINESS & PROFESSIONS CODE SECTIONS 17200, ET, SEQ. FAILS AS  
A MATTER OF LAW**

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC (“HRL”) is a Delaware limited liability company, doing business in Louisville, Kentucky.	Midland Depo., 16:19-17:11, <u>Docket</u> No. 62-5; Answer to First Amended Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office building in Kentucky.	Midland Depo., 16:19-17:11; 161:7-12, <u>Docket</u> No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant’s Derby Wars’ website (www.derbywars.com) proclaims: <b>“Horse Racing Handicapping Contests”</b> <b>“Play for free or real money”</b> <b>“Pick a horse in each race”</b> <b>“Over \$20-million paid out in winnings!”</b>	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players’ funds in a bank account consisting only of players’ funds, and when the player enters a contest, his account is deducted by the amount of the wager (the “entry	Shutty Depo., 112:16-113:24, <u>Docket</u> No. 62-6; Midland Depo., 168:17-23; 327:15-23, <u>Docket</u> No. 62-5.

1	fee”).	
2	78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
3	wager (the “prize”), his Derby Wars	No. 62-5.
4	account is credited with his winnings.	
5	The player can thereafter request a	
6	withdrawal from his account, in which	
7	case a check is sent to him from the	
8	Derby Wars account.	
9	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
10	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
11	California, Florida, Maryland or Oregon.	
12	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
13	allowing players to “win real money,”	Midland Depo., 181:22-24, <u>Docket</u> No.
14	and the players do win real money.	62-5.
15	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
16	that are “head-to-head”.	
17	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
18	entry fee for a fixed prize.	62-5.
19	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
20	players each pay a \$22 entry fee to	
21	compete with each other.	
22	84. The remaining \$4 is the “take out” or	Midland Depo., 220:13-22; 233:6-10,
23	“rake” retained by Defendant.	<u>Docket</u> No. 62-5.
24	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
25	contests with the prize up to \$1,500, with	
26	\$799 entry fees.	
27	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
28	players must select horses in 6 to 10	
	different races running at various race	
	tracks, including Plaintiffs’ tracks.	
	87. In the contests, “the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks”, and are	No. 62-5.
	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs’ tracks.	
	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
		<u>Docket</u> No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
	(the most winnings) at the end of the	62-5.
	contest, wins the “prize.”	

90. Defendant also offers “high stakes” contests for up to \$300,000, with a \$2,200 entry fee.	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
91. In agreements with third parties, Defendant even refers to its players as “bettors.”	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7; Exhibit 6, p. 2, “Exhibit 5;” Ellis Dec., ¶ 11, Exhibit 7, p. 2, “Exhibit 5;”, Ellis Dec., ¶ 12, Exhibit 8, p. 2, “Exhibit 5.”
92. A player is awarded points on the same basis as if he had placed a \$2 bet at the racetrack, subject to adjustment for maximum payouts.	Midland Depo., 134:6-135:5, <u>Docket</u> No. 62-5.
93. For instance, if a horse would pay \$6.40, the player is awarded 6.40 points.	Midland Depo., 135:18-136:10, <u>Docket</u> No. 62-5.
95. Derby Wars uses “points or dollars interchangeably.”	Midland Depo., 136:6-10, <u>Docket</u> No. 62-5.
96. The player has no influence over the actual results of the horse race; at the time when the player enters a contest, it is uncertain as to which horse will win the race.	Midland Depo., 177:21-178:8, <u>Docket</u> No. 62-5.
97. The winner of the contest will be determined by future events.	Midland Depo., 178:9-13, <u>Docket</u> No. 62-5.
98. Many of the races used in the contests take place at Plaintiffs’ race tracks in California, Florida, Maryland and Oregon.	Midland Depo., 180:12-181:21, <u>Docket</u> No. 62-5.
99. Unlike other sports, horseracing is almost exclusively funded by wagering.	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
100. The total amount wagered is the “handle.”	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
102. The remaining approximately twenty percent is known as the “takeout,” the amount initially retained by the race track.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
103. The takeout is then divided, pursuant to contract and law, among the stakeholders in the form of commissions paid to the racetracks; purses paid to the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.

1	owners, trainers and jockeys of the	
2	horses in the race; taxes paid to the state;	
3	and funds dedicated to equine research,	
4	workers' compensation funds, worker	
5	health and welfare, etc., that benefit the	
6	backstretch workers.	
7	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
8	horseracing includes "Win" (picking a	
9	horse to finish first in the race), "Place"	
10	(picking a horse to finish first or second	
11	in the race) and "Show" (picking a horse	
12	to finish first, second or third in the race).	
13	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
14	Place or Show is called an exotic wager.	
15	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
16	Double" (picking the winning horse in	
17	two consecutive races), "Exacta"	
18	(picking the first two horses to finish in a	
19	single race in the exact order), "Trifecta"	
20	(picking the first three horses to finish in	
21	a single race in the exact order), "Pick	
22	Three" (picking the winning horse in	
23	three consecutive races), "Pick Four"	
24	(picking the winning horse in four	
25	consecutive races), and a "Pick Six"	
26	(picking the winning horse in six	
27	consecutive races.)	
28	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
	are indeed <i>wagers</i> when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
	racetrack.	
	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	only took place live (at the actual track	
	where the race was being run), such that	
	bettors had to attend the race to place a	
	wager.	
	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers	
	at locations other than the track where	
	the race was being run.	
	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.

1	which was explicitly intended to	
2	“regulate interstate commerce with	
3	respect to wagering on horseracing.” As	
4	provided therein, no one “may accept an	
5	interstate off-track wager except as	
6	provided in” the IHA.	
7	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
8	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No.
9		62-6.
10	112. From the late 1990’s through today,	Daruty Dec., ¶ 14.
11	the industry has experienced much	
12	growth in the area of Advanced Deposit	
13	Wagering (“ADW”).	
14	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
15	with a licensed, regulated	
16	online/telephone wagering operator, and	
17	then issues wagering instructions (via	
18	telephone or internet) to that operator to	
19	place a wager on a specific race using	
20	funds in the account.	
21	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
22	winning funds are deposited directly into	
23	the customer’s account.	
24	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
25	interstate wagers on horseraces by an	
26	entity (including an ADW operator),	
27	which has obtained consent from, <i>inter</i>	
28	<i>alia</i> , the host racing association on whose	
	races such wagers are placed, such as	
	Plaintiffs.	
	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
	required consent only if it receives a	
	payment of money or other value from	
	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
	(Gulfstream Park and Gulfstream Park	

1	West), Maryland (Pimlico and Laurel	
2	Park), and Oregon (Portland Meadows).	
3	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
4	Association within the meaning of the	
5	IHA.	
6	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
7	host State to conduct racing.	
8	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
9	agreement with its Horsemen's Group, as	
10	required by the IHA.	
11	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
12	consent to Defendant to accept a wager	
13	on a race run at any of Plaintiffs' race	
14	tracks.	
15	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
16	consent to Defendant to accept a wager	
17	from a resident of the States of	
18	California, Florida, Maryland or Oregon.	
19	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
20	money from Defendant with respect to	
21	wagers (or entry fees) accepted by	
22	Defendant	
23	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
24	agreements with any of the Plaintiffs.	
25	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
26	received consent from any Plaintiff to	
27	accept wagers on races run at the	
28	Plaintiffs' race tracks.	
	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
	received consent of any host racing	No. 62-7.
	commission to accept wagers on	
	Plaintiffs' races.	
	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
	received consent from any off-track	<u>Docket</u> No. 62-7.
	racing association to conduct its contests.	
	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
	entry fees from residents of New York,	25.
	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶6.
	website has access to the leaderboards, a	
	display of other participants' selections,	

1	and a graphic that displays how many	
2	people selected each horse, without	
3	paying an entry fee.	
4	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
5	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
6	no other source of revenue for the Derby	
7	Wars contests.	
8	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
9	model is that the cash prize in a contest	Midland Depo., 149:1-5.
10	must be less than the cash entry fees.	
11	133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
12	wager from a resident of California,	
13	Florida, Maryland or Oregon, the host	
14	racing association in that state receives a	
15	payment as its “Market Access Fee” or	
16	“Source Market Fee.”	
17	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, <u>Docket</u> No. 62-
18	DerbyWars.com website.	5.
19	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
20	continually operated these contests on a	Midland Depo., 124:24-125:1.
21	daily basis since 2011.	

**ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT’S ISSUE IC - THAT PLAINTIFFS’ IHA  
CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS**

<b>UNDISPUTED MATERIAL FACTS</b>	<b>EVIDENCE</b>
72. Horse Racing Labs, LLC (“HRL”) is a Delaware limited liability company, doing business in Louisville, Kentucky.	Midland Depo., 16:19-17:11, <u>Docket</u> No. 62-5; Answer to First Amended Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office building in Kentucky.	Midland Depo., 16:19-17:11; 161:7-12, <u>Docket</u> No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant’s Derby Wars’ website (www.derbywars.com) proclaims: <b>“Horse Racing Handicapping Contests”</b> <b>“Play for free or real money”</b> <b>“Pick a horse in each race”</b> <b>“Over \$20-million paid out in winnings!”</b>	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players’ funds in a bank account consisting only of players’ funds, and when the player enters a contest, his account is deducted by the amount of the wager (the “entry fee”).	Shutty Depo., 112:16-113:24, <u>Docket</u> No. 62-6; Midland Depo., 168:17-23; 327:15-23, <u>Docket</u> No. 62-5.
78. If the player eventually wins his wager (the “prize”), his Derby Wars	Midland Depo., 330:10-331:21, <u>Docket</u> No. 62-5.

PLAINTIFFS’ SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

1	account is credited with his winnings.	
2	The player can thereafter request a	
3	withdrawal from his account, in which	
4	case a check is sent to him from the	
	Derby Wars account.	
5	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
6	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
	California, Florida, Maryland or Oregon.	
7	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
8	allowing players to “win real money,”	Midland Depo., 181:22-24, <u>Docket</u> No.
	and the players do win real money.	62-5.
9	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	that are “head-to-head”.	
10	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
11	entry fee for a fixed prize.	62-5.
12	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
13	players each pay a \$22 entry fee to	
	compete with each other.	
14	84. The remaining \$4 is the “take out” or	Midland Depo., 220:13-22; 233:6-10,
	“rake” retained by Defendant.	<u>Docket</u> No. 62-5.
15	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
16	contests with the prize up to \$1,500, with	
	\$799 entry fees.	
17	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
18	players must select horses in 6 to 10	
	different races running at various race	
19	tracks, including Plaintiffs’ tracks.	
20	87. In the contests, “the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
21	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
22	payouts at actual race tracks”, and are	No. 62-5.
23	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs’ tracks.	
24	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
		<u>Docket</u> No. 62-5.
25	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
26	(the most winnings) at the end of the	62-5.
	contest, wins the “prize.”	
27	90. Defendant also offers “high stakes”	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
28	contests for up to \$300,000, with a	
	\$2,200 entry fee.	

91. In agreements with third parties, Defendant even refers to its players as “bettors.”	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7; Exhibit 6, p. 2, “Exhibit 5;” Ellis Dec., ¶ 11, Exhibit 7, p. 2, “Exhibit 5;”, Ellis Dec., ¶ 12, Exhibit 8, p. 2, “Exhibit 5.”
92. A player is awarded points on the same basis as if he had placed a \$2 bet at the racetrack, subject to adjustment for maximum payouts.	Midland Depo., 134:6-135:5, <u>Docket</u> No. 62-5.
93. For instance, if a horse would pay \$6.40, the player is awarded 6.40 points.	Midland Depo., 135:18-136:10, <u>Docket</u> No. 62-5.
95. Derby Wars uses “points or dollars interchangeably.”	Midland Depo., 136:6-10, <u>Docket</u> No. 62-5.
96. The player has no influence over the actual results of the horse race; at the time when the player enters a contest, it is uncertain as to which horse will win the race.	Midland Depo., 177:21-178:8, <u>Docket</u> No. 62-5.
97. The winner of the contest will be determined by future events.	Midland Depo., 178:9-13, <u>Docket</u> No. 62-5.
98. Many of the races used in the contests take place at Plaintiffs’ race tracks in California, Florida, Maryland and Oregon.	Midland Depo., 180:12-181:21, <u>Docket</u> No. 62-5.
99. Unlike other sports, horseracing is almost exclusively funded by wagering.	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
100. The total amount wagered is the “handle.”	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
102. The remaining approximately twenty percent is known as the “takeout,” the amount initially retained by the race track.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
103. The takeout is then divided, pursuant to contract and law, among the stakeholders in the form of commissions paid to the racetracks; purses paid to the owners, trainers and jockeys of the horses in the race; taxes paid to the state; and funds dedicated to equine research,	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.

1	workers' compensation funds, worker health and welfare, etc., that benefit the backstretch workers.	
2		
3	104. The type of wagering available on horseracing includes "Win" (picking a horse to finish first in the race), "Place" (picking a horse to finish first or second in the race) and "Show" (picking a horse to finish first, second or third in the race).	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
4		
5		
6		
7	105. Any type of wager other than Win, Place or Show is called an exotic wager.	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
8		
9	106. Exotic wagers include the "Daily Double" (picking the winning horse in two consecutive races), "Exacta" (picking the first two horses to finish in a single race in the exact order), "Trifecta" (picking the first three horses to finish in a single race in the exact order), "Pick Three" (picking the winning horse in three consecutive races), "Pick Four" (picking the winning horse in four consecutive races), and a "Pick Six" (picking the winning horse in six consecutive races.)	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
10		
11		
12		
13		
14		
15		
16		
17	107. Defendant concedes that all of these (Win, Place, Show and exotic wagers) are indeed <i>wagers</i> when placed at the racetrack.	Midland Depo., 201:23-203:18, <u>Docket</u> No. 62-5; Shutty Depo., 91:2-7; 99:23-100:3; 102:17-19. <u>Docket</u> No. 62-6.
18		
19		
20	108. Historically, wagering on horses only took place live (at the actual track where the race was being run), such that bettors had to attend the race to place a wager.	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
21		
22		
23	109. Eventually, off-track betting facilities opened, which accepted wagers at locations other than the track where the race was being run.	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
24		
25		
26	110. In 1978, Congress enacted the IHA, which was explicitly intended to "regulate interstate commerce with respect to wagering on horseracing." As	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
27		
28		

1	provided therein, no one “may accept an	
2	interstate off-track wager except as	
3	provided in” the IHA.	
4	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
5	IHA.	62-5; Shuttly Depo., 92:9-14, <u>Docket</u> No.
6		62-6.
7	112. From the late 1990’s through today,	Daruty Dec., ¶ 14.
8	the industry has experienced much	
9	growth in the area of Advanced Deposit	
10	Wagering (“ADW”).	
11	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
12	with a licensed, regulated	
13	online/telephone wagering operator, and	
14	then issues wagering instructions (via	
15	telephone or internet) to that operator to	
16	place a wager on a specific race using	
17	funds in the account.	
18	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
19	winning funds are deposited directly into	
20	the customer’s account.	
21	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
22	interstate wagers on horseraces by an	
23	entity (including an ADW operator),	
24	which has obtained consent from, <i>inter</i>	
25	<i>alia</i> , the host racing association on whose	
26	races such wagers are placed, such as	
27	Plaintiffs.	
28	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
	required consent only if it receives a	
	payment of money or other value from	
	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
	(Gulfstream Park and Gulfstream Park	
	West), Maryland (Pimlico and Laurel	
	Park), and Oregon (Portland Meadows).	
	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.

1	Association within the meaning of the IHA.	
2	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
3	host State to conduct racing.	
4	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
5	agreement with its Horsemen's Group, as	
6	required by the IHA.	
7	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
8	consent to Defendant to accept a wager	
9	on a race run at any of Plaintiffs' race	
10	tracks.	
11	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
12	consent to Defendant to accept a wager	
13	from a resident of the States of	
14	California, Florida, Maryland or Oregon.	
15	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
16	money from Defendant with respect to	
17	wagers (or entry fees) accepted by	
18	Defendant	
19	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
20	agreements with any of the Plaintiffs.	
21	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
22	received consent from any Plaintiff to	
23	accept wagers on races run at the	
24	Plaintiffs' race tracks.	
25	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
26	received consent of any host racing	No. 62-7.
27	commission to accept wagers on	
28	Plaintiffs' races.	
	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
	received consent from any off-track	<u>Docket</u> No. 62-7.
	racing association to conduct its contests.	
	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
	entry fees from residents of New York,	25.
	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7
	website has access to the leaderboards, a	
	display of other participants' selections,	
	and a graphic that displays how many	
	people selected each horse, without	
	paying an entry fee.	

131. The prizes offered by Defendant consist of entry fees only; Defendant has no other source of revenue for the Derby Wars contests.	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B; Shetty Depo., 21:17-22.
132. Defendant admits that its business model is that the cash prize in a contest must be less than the cash entry fees.	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A Midland Depo., 149:1-5.
133. When a licensed ADW accepts a wager from a resident of California, Florida, Maryland or Oregon, the host racing association in that state receives a payment as its “Market Access Fee” or “Source Market Fee.”	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
134. In October, 2011, HRL launched the DerbyWars.com website.	Midland Depo., 72:3-5, <u>Docket</u> No. 62-5.
135. Defendant admits that that it has continually operated these contests on a daily basis since 2011.	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A, Midland Depo., 124:24-125:1.

**ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT’S ISSUE IB - THAT PLAINTIFFS’ SECOND  
CAUSE OF ACTION FOR ALLEGED VIOLATION OF CALIFORNIA  
BUSINESS & PROFESSIONS CODE SECTIONS 17200, ET, SEQ. FAILS AS  
A MATTER OF LAW**

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC (“HRL”) is a Delaware limited liability company, doing business in Louisville, Kentucky.	Midland Depo., 16:19-17:11, <u>Docket</u> No. 62-5; Answer to First Amended Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office building in Kentucky.	Midland Depo., 16:19-17:11; 161:7-12, <u>Docket</u> No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant’s Derby Wars’ website (www.derbywars.com) proclaims: <b>“Horse Racing Handicapping Contests”</b> <b>“Play for free or real money”</b> <b>“Pick a horse in each race”</b> <b>“Over \$20-million paid out in winnings!”</b>	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players’ funds in a bank account consisting only of players’ funds, and when the player enters a contest, his account is deducted by the amount of the wager (the “entry	Shutty Depo., 112:16-113:24, <u>Docket</u> No. 62-6; Midland Depo., 168:17-23; 327:15-23, <u>Docket</u> No. 62-5.

1	fee”).	
2	78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
3	wager (the “prize”), his Derby Wars	No. 62-5.
4	account is credited with his winnings.	
5	The player can thereafter request a	
6	withdrawal from his account, in which	
7	case a check is sent to him from the	
8	Derby Wars account.	
9	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
10	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
11	California, Florida, Maryland or Oregon.	
12	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
13	allowing players to “win real money,”	Midland Depo., 181:22-24, <u>Docket</u> No.
14	and the players do win real money.	62-5.
15	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
16	that are “head-to-head”.	
17	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
18	entry fee for a fixed prize.	62-5.
19	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
20	players each pay a \$22 entry fee to	
21	compete with each other.	
22	84. The remaining \$4 is the “take out” or	Midland Depo., 220:13-22; 233:6-10,
23	“rake” retained by Defendant.	<u>Docket</u> No. 62-5.
24	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
25	contests with the prize up to \$1,500, with	
26	\$799 entry fees.	
27	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
28	players must select horses in 6 to 10	
	different races running at various race	
	tracks, including Plaintiffs’ tracks.	
	87. In the contests, “the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks”, and are	No. 62-5.
	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs’ tracks.	
	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
		<u>Docket</u> No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
	(the most winnings) at the end of the	62-5.
	contest, wins the “prize.”	

1	90. Defendant also offers “high stakes” contests for up to \$300,000, with a \$2,200 entry fee.	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
2		
3	91. In agreements with third parties, Defendant even refers to its players as “bettors.”	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7; Exhibit 6, p. 2, “Exhibit 5;” Ellis Dec., ¶ 11, Exhibit 7, p. 2, “Exhibit 5;”, Ellis Dec., ¶ 12, Exhibit 8, p. 2, “Exhibit 5.”
4		
5	92. A player is awarded points on the same basis as if he had placed a \$2 bet at the racetrack, subject to adjustment for maximum payouts.	Midland Depo., 134:6-135:5, <u>Docket</u> No. 62-5.
6		
7	93. For instance, if a horse would pay \$6.40, the player is awarded 6.40 points.	Midland Depo., 135:18-136:10, <u>Docket</u> No. 62-5.
8		
9	95. Derby Wars uses “points or dollars interchangeably.”	Midland Depo., 136:6-10, <u>Docket</u> No. 62-5.
10		
11	96. The player has no influence over the actual results of the horse race; at the time when the player enters a contest, it is uncertain as to which horse will win the race.	Midland Depo., 177:21-178:8, <u>Docket</u> No. 62-5.
12		
13	97. The winner of the contest will be determined by future events.	Midland Depo., 178:9-13, <u>Docket</u> No. 62-5.
14		
15	98. Many of the races used in the contests take place at Plaintiffs’ race tracks in California, Florida, Maryland and Oregon.	Midland Depo., 180:12-181:21, <u>Docket</u> No. 62-5.
16		
17	99. Unlike other sports, horseracing is almost exclusively funded by wagering.	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
18		
19	100. The total amount wagered is the “handle.”	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
20		
21	101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
22		
23	102. The remaining approximately twenty percent is known as the “takeout,” the amount initially retained by the race track.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
24		
25	103. The takeout is then divided, pursuant to contract and law, among the stakeholders in the form of commissions paid to the racetracks; purses paid to the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
26		
27		
28		

1	owners, trainers and jockeys of the	
2	horses in the race; taxes paid to the state;	
3	and funds dedicated to equine research,	
4	workers' compensation funds, worker	
5	health and welfare, etc., that benefit the	
6	backstretch workers.	
7	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
8	horseracing includes "Win" (picking a	
9	horse to finish first in the race), "Place"	
10	(picking a horse to finish first or second	
11	in the race) and "Show" (picking a horse	
12	to finish first, second or third in the race).	
13	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
14	Place or Show is called an exotic wager.	
15	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
16	Double" (picking the winning horse in	
17	two consecutive races), "Exacta"	
18	(picking the first two horses to finish in a	
19	single race in the exact order), "Trifecta"	
20	(picking the first three horses to finish in	
21	a single race in the exact order), "Pick	
22	Three" (picking the winning horse in	
23	three consecutive races), "Pick Four"	
24	(picking the winning horse in four	
25	consecutive races), and a "Pick Six"	
26	(picking the winning horse in six	
27	consecutive races.)	
28	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
	are indeed <i>wagers</i> when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
	racetrack.	
	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	only took place live (at the actual track	
	where the race was being run), such that	
	bettors had to attend the race to place a	
	wager.	
	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers	
	at locations other than the track where	
	the race was being run.	
	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.

1	which was explicitly intended to	
2	“regulate interstate commerce with	
3	respect to wagering on horseracing.” As	
4	provided therein, no one “may accept an	
5	interstate off-track wager except as	
6	provided in” the IHA.	
7	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
8	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No.
9		62-6.
10	112. From the late 1990’s through today,	Daruty Dec., ¶ 14.
11	the industry has experienced much	
12	growth in the area of Advanced Deposit	
13	Wagering (“ADW”).	
14	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
15	with a licensed, regulated	
16	online/telephone wagering operator, and	
17	then issues wagering instructions (via	
18	telephone or internet) to that operator to	
19	place a wager on a specific race using	
20	funds in the account.	
21	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
22	winning funds are deposited directly into	
23	the customer’s account.	
24	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
25	interstate wagers on horseraces by an	
26	entity (including an ADW operator),	
27	which has obtained consent from, <i>inter</i>	
28	<i>alia</i> , the host racing association on whose	
	racetracks such wagers are placed, such as	
	Plaintiffs.	
	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
	required consent only if it receives a	
	payment of money or other value from	
	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
	(Gulfstream Park and Gulfstream Park	

1	West), Maryland (Pimlico and Laurel	
2	Park), and Oregon (Portland Meadows).	
3	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
4	Association within the meaning of the	
5	IHA.	
6	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
7	host State to conduct racing.	
8	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
9	agreement with its Horsemen's Group, as	
10	required by the IHA.	
11	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
12	consent to Defendant to accept a wager	
13	on a race run at any of Plaintiffs' race	
14	tracks.	
15	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
16	consent to Defendant to accept a wager	
17	from a resident of the States of	
18	California, Florida, Maryland or Oregon.	
19	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
20	money from Defendant with respect to	
21	wagers (or entry fees) accepted by	
22	Defendant	
23	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
24	agreements with any of the Plaintiffs.	
25	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
26	received consent from any Plaintiff to	
27	accept wagers on races run at the	
28	Plaintiffs' race tracks.	
	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
	received consent of any host racing	No. 62-7.
	commission to accept wagers on	
	Plaintiffs' races.	
	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
	received consent from any off-track	<u>Docket</u> No. 62-7.
	racing association to conduct its contests.	
	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
	entry fees from residents of New York,	25.
	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7.
	website has access to the leaderboards, a	
	display of other participants' selections,	

1	and a graphic that displays how many	
2	people selected each horse, without	
3	paying an entry fee.	
4	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
5	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
6	no other source of revenue for the Derby	
7	Wars contests.	
8	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
9	model is that the cash prize in a contest	Midland Depo., 149:1-5.
10	must be less than the cash entry fees.	
11	133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
12	wager from a resident of California,	
13	Florida, Maryland or Oregon, the host	
14	racing association in that state receives a	
15	payment as its “Market Access Fee” or	
	“Source Market Fee.”	
16	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, <u>Docket</u> No. 62-
17	DerbyWars.com website.	5.
18	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
19	continually operated these contests on a	Midland Depo., 124:24-125:1.
20	daily basis since 2011.	

**ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT’S ISSUE ID - THAT PLAINTIFFS’ CLAIMS  
ARE BARRED BY THE EQUITABLE DOCTRINE OF ESTOPPEL**

<b>UNDISPUTED MATERIAL FACTS</b>	<b>EVIDENCE</b>
72. Horse Racing Labs, LLC (“HRL”) is a Delaware limited liability company, doing business in Louisville, Kentucky.	Midland Depo., 16:19-17:11, <u>Docket</u> No. 62-5; Answer to First Amended Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office building in Kentucky.	Midland Depo., 16:19-17:11; 161:7-12, <u>Docket</u> No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant’s Derby Wars’ website (www.derbywars.com) proclaims: <b>“Horse Racing Handicapping Contests”</b> <b>“Play for free or real money”</b> <b>“Pick a horse in each race”</b> <b>“Over \$20-million paid out in winnings!”</b>	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players’ funds in a bank account consisting only of players’ funds, and when the player enters a contest, his account is deducted by the amount of the wager (the “entry fee”).	Shutty Depo., 112:16-113:24, <u>Docket</u> No. 62-6; Midland Depo., 168:17-23; 327:15-23, <u>Docket</u> No. 62-5.
78. If the player eventually wins his wager (the “prize”), his Derby Wars	Midland Depo., 330:10-331:21, <u>Docket</u> No. 62-5.

PLAINTIFFS’ SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

1	account is credited with his winnings.	
2	The player can thereafter request a	
3	withdrawal from his account, in which	
4	case a check is sent to him from the	
5	Derby Wars account.	
6	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
7	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
8	California, Florida, Maryland or Oregon.	
9	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
10	allowing players to “win real money,”	Midland Depo., 181:22-24, <u>Docket</u> No.
11	and the players do win real money.	62-5.
12	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
13	that are “head-to-head”.	
14	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
15	entry fee for a fixed prize.	62-5.
16	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
17	players each pay a \$22 entry fee to	
18	compete with each other.	
19	84. The remaining \$4 is the “take out” or	Midland Depo., 220:13-22; 233:6-10,
20	“rake” retained by Defendant.	<u>Docket</u> No. 62-5.
21	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
22	contests with the prize up to \$1,500, with	
23	\$799 entry fees.	
24	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
25	players must select horses in 6 to 10	
26	different races running at various race	
27	tracks, including Plaintiffs’ tracks.	
28	87. In the contests, “the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks”, and are	No. 62-5.
	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs’ tracks.	
	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
		<u>Docket</u> No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
	(the most winnings) at the end of the	62-5.
	contest, wins the “prize.”	
	90. Defendant also offers “high stakes”	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
	contests for up to \$300,000, with a	
	\$2,200 entry fee.	

91. In agreements with third parties, Defendant even refers to its players as “bettors.”	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7; Exhibit 6, p. 2, “Exhibit 5;” Ellis Dec., ¶ 11, Exhibit 7, p. 2, “Exhibit 5;”, Ellis Dec., ¶ 12, Exhibit 8, p. 2, “Exhibit 5.”
92. A player is awarded points on the same basis as if he had placed a \$2 bet at the racetrack, subject to adjustment for maximum payouts.	Midland Depo., 134:6-135:5, <u>Docket</u> No. 62-5.
93. For instance, if a horse would pay \$6.40, the player is awarded 6.40 points.	Midland Depo., 135:18-136:10, <u>Docket</u> No. 62-5.
95. Derby Wars uses “points or dollars interchangeably.”	Midland Depo., 136:6-10, <u>Docket</u> No. 62-5.
96. The player has no influence over the actual results of the horse race; at the time when the player enters a contest, it is uncertain as to which horse will win the race.	Midland Depo., 177:21-178:8, <u>Docket</u> No. 62-5.
97. The winner of the contest will be determined by future events.	Midland Depo., 178:9-13, <u>Docket</u> No. 62-5.
98. Many of the races used in the contests take place at Plaintiffs’ race tracks in California, Florida, Maryland and Oregon.	Midland Depo., 180:12-181:21, <u>Docket</u> No. 62-5.
99. Unlike other sports, horseracing is almost exclusively funded by wagering.	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
100. The total amount wagered is the “handle.”	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
102. The remaining approximately twenty percent is known as the “takeout,” the amount initially retained by the race track.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
103. The takeout is then divided, pursuant to contract and law, among the stakeholders in the form of commissions paid to the racetracks; purses paid to the owners, trainers and jockeys of the horses in the race; taxes paid to the state; and funds dedicated to equine research,	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.

1	workers' compensation funds, worker health and welfare, etc., that benefit the backstretch workers.	
2		
3	104. The type of wagering available on horseracing includes "Win" (picking a horse to finish first in the race), "Place" (picking a horse to finish first or second in the race) and "Show" (picking a horse to finish first, second or third in the race).	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
4		
5		
6		
7	105. Any type of wager other than Win, Place or Show is called an exotic wager.	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
8		
9	106. Exotic wagers include the "Daily Double" (picking the winning horse in two consecutive races), "Exacta" (picking the first two horses to finish in a single race in the exact order), "Trifecta" (picking the first three horses to finish in a single race in the exact order), "Pick Three" (picking the winning horse in three consecutive races), "Pick Four" (picking the winning horse in four consecutive races), and a "Pick Six" (picking the winning horse in six consecutive races.)	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
10		
11		
12		
13		
14		
15		
16		
17	107. Defendant concedes that all of these (Win, Place, Show and exotic wagers) are indeed <i>wagers</i> when placed at the racetrack.	Midland Depo., 201:23-203:18, <u>Docket</u> No. 62-5; Shutty Depo., 91:2-7; 99:23-100:3; 102:17-19. <u>Docket</u> No. 62-6.
18		
19		
20	108. Historically, wagering on horses only took place live (at the actual track where the race was being run), such that bettors had to attend the race to place a wager.	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
21		
22		
23	109. Eventually, off-track betting facilities opened, which accepted wagers at locations other than the track where the race was being run.	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
24		
25		
26	110. In 1978, Congress enacted the IHA, which was explicitly intended to "regulate interstate commerce with respect to wagering on horseracing." As	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
27		
28		

1	provided therein, no one “may accept an	
2	interstate off-track wager except as	
3	provided in” the IHA.	
4	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
5	IHA.	62-5; Shuttly Depo., 92:9-14, <u>Docket</u> No.
6		62-6.
7	112. From the late 1990’s through today,	Daruty Dec., ¶ 14.
8	the industry has experienced much	
9	growth in the area of Advanced Deposit	
10	Wagering (“ADW”).	
11	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
12	with a licensed, regulated	
13	online/telephone wagering operator, and	
14	then issues wagering instructions (via	
15	telephone or internet) to that operator to	
16	place a wager on a specific race using	
17	funds in the account.	
18	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
19	winning funds are deposited directly into	
20	the customer’s account.	
21	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
22	interstate wagers on horseraces by an	
23	entity (including an ADW operator),	
24	which has obtained consent from, <i>inter</i>	
25	<i>alia</i> , the host racing association on whose	
26	racetracks such wagers are placed, such as	
27	Plaintiffs.	
28	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
	required consent only if it receives a	
	payment of money or other value from	
	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
	(Gulfstream Park and Gulfstream Park	
	West), Maryland (Pimlico and Laurel	
	Park), and Oregon (Portland Meadows).	
	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.

1	Association within the meaning of the IHA.	
2	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
3	host State to conduct racing.	
4	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
5	agreement with its Horsemen's Group, as	
6	required by the IHA.	
7	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
8	consent to Defendant to accept a wager	
9	on a race run at any of Plaintiffs' race	
10	tracks.	
11	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
12	consent to Defendant to accept a wager	
13	from a resident of the States of	
14	California, Florida, Maryland or Oregon.	
15	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
16	money from Defendant with respect to	
17	wagers (or entry fees) accepted by	
18	Defendant	
19	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
20	agreements with any of the Plaintiffs.	
21	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
22	received consent from any Plaintiff to	
23	accept wagers on races run at the	
24	Plaintiffs' race tracks.	
25	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
26	received consent of any host racing	No. 62-7.
27	commission to accept wagers on	
28	Plaintiffs' races.	
	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
	received consent from any off-track	<u>Docket</u> No. 62-7.
	racing association to conduct its contests.	
	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
	entry fees from residents of New York,	25.
	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7.
	website has access to the leaderboards, a	
	display of other participants' selections,	
	and a graphic that displays how many	
	people selected each horse, without	
	paying an entry fee.	

131. The prizes offered by Defendant consist of entry fees only; Defendant has no other source of revenue for the Derby Wars contests.	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B; Shutty Depo., 21:17-22.
132. Defendant admits that its business model is that the cash prize in a contest must be less than the cash entry fees.	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A Midland Depo., 149:1-5.
133. When a licensed ADW accepts a wager from a resident of California, Florida, Maryland or Oregon, the host racing association in that state receives a payment as its “Market Access Fee” or “Source Market Fee.”	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
134. In October, 2011, HRL launched the DerbyWars.com website.	Midland Depo., 72:3-5, <u>Docket</u> No. 62-5.
135. Defendant admits that that it has continually operated these contests on a daily basis since 2011.	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A, Midland Depo., 124:24-125:1.

**ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT’S ISSUE IE - THAT THE COURT SHOULD  
ABSTAIN FROM ADJUDICATING PLAINTIFFS’ CLAIMS, IN DEFERENCE  
TO LEGISLATIVE FUNCTION**

<b>UNDISPUTED MATERIAL FACTS</b>	<b>EVIDENCE</b>
72. Horse Racing Labs, LLC (“HRL”) is a Delaware limited liability company, doing business in Louisville, Kentucky.	Midland Depo., 16:19-17:11, <u>Docket</u> No. 62-5; Answer to First Amended Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office building in Kentucky.	Midland Depo., 16:19-17:11; 161:7-12, <u>Docket</u> No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant’s Derby Wars’ website (www.derbywars.com) proclaims: <b>“Horse Racing Handicapping Contests”</b> <b>“Play for free or real money”</b> <b>“Pick a horse in each race”</b> <b>“Over \$20-million paid out in winnings!”</b>	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players’ funds in a bank account consisting only of players’ funds, and when the player enters a contest, his account is deducted by the amount of the wager (the “entry fee”).	Shutty Depo., 112:16-113:24, <u>Docket</u> No. 62-6; Midland Depo., 168:17-23; 327:15-23, <u>Docket</u> No. 62-5.
78. If the player eventually wins, his	Midland Depo., 330:10-331:21, <u>Docket</u>

PLAINTIFFS’ SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

1	wager (the “prize”), his Derby Wars	No. 62-5.
2	account is credited with his winnings.	
3	The player can thereafter request a	
4	withdrawal from his account, in which	
5	case a check is sent to him from the	
6	Derby Wars account.	
7	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
8	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
9	California, Florida, Maryland or Oregon.	
10	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
11	allowing players to “win real money,”	Midland Depo., 181:22-24, <u>Docket</u> No.
12	and the players do win real money.	62-5.
13	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
14	that are “head-to-head”.	
15	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
16	entry fee for a fixed prize.	62-5.
17	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
18	players each pay a \$22 entry fee to	
19	compete with each other.	
20	84. The remaining \$4 is the “take out” or	Midland Depo., 220:13-22; 233:6-10,
21	“rake” retained by Defendant.	<u>Docket</u> No. 62-5.
22	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
23	contests with the prize up to \$1,500, with	
24	\$799 entry fees.	
25	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
26	players must select horses in 6 to 10	
27	different races running at various race	
28	tracks, including Plaintiffs’ tracks.	
	87. In the contests, “the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks”, and are	No. 62-5.
	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs’ tracks.	
	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
		<u>Docket</u> No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
	(the most winnings) at the end of the	62-5.
	contest, wins the “prize.”	
	90. Defendant also offers “high stakes”	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
	contests for up to \$300,000, with a	

1	\$2,200 entry fee.	
2	91. In agreements with third parties, Defendant even refers to its players as	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7;
3	“bettors.”	Exhibit 6, p. 2, “Exhibit 5;” Ellis Dec., ¶ 11, Exhibit 7, p. 2, “Exhibit 5;”, Ellis Dec., ¶ 12, Exhibit 8, p. 2, “Exhibit 5.”
4	92. A player is awarded points on the same basis as if he had placed a \$2 bet at the racetrack, subject to adjustment for maximum payouts.	Midland Depo., 134:6-135:5, <u>Docket</u> No. 62-5.
5	93. For instance, if a horse would pay \$6.40, the player is awarded 6.40 points.	Midland Depo., 135:18-136:10, <u>Docket</u> No. 62-5.
6	95. Derby Wars uses “points or dollars interchangeably.”	Midland Depo., 136:6-10, <u>Docket</u> No. 62-5.
7	96. The player has no influence over the actual results of the horse race; at the time when the player enters a contest, it is uncertain as to which horse will win the race.	Midland Depo., 177:21-178:8, <u>Docket</u> No. 62-5.
8	97. The winner of the contest will be determined by future events.	Midland Depo., 178:9-13, <u>Docket</u> No. 62-5.
9	98. Many of the races used in the contests take place at Plaintiffs’ race tracks in California, Florida, Maryland and Oregon.	Midland Depo., 180:12-181:21, <u>Docket</u> No. 62-5.
10	99. Unlike other sports, horseracing is almost exclusively funded by wagering.	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
11	100. The total amount wagered is the “handle.”	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
12	101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
13	102. The remaining approximately twenty percent is known as the “takeout,” the amount initially retained by the race track.	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
14	103. The takeout is then divided, pursuant to contract and law, among the stakeholders in the form of commissions paid to the racetracks; purses paid to the owners, trainers and jockeys of the horses in the race; taxes paid to the state;	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.

1	and funds dedicated to equine research,	
2	workers' compensation funds, worker	
3	health and welfare, etc., that benefit the	
4	backstretch workers.	
5	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
6	horseracing includes "Win" (picking a	
7	horse to finish first in the race), "Place"	
8	(picking a horse to finish first or second	
9	in the race) and "Show" (picking a horse	
10	to finish first, second or third in the race).	
11	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
12	Place or Show is called an exotic wager.	
13	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
14	Double" (picking the winning horse in	
15	two consecutive races), "Exacta"	
16	(picking the first two horses to finish in a	
17	single race in the exact order), "Trifecta"	
18	(picking the first three horses to finish in	
19	a single race in the exact order), "Pick	
20	Three" (picking the winning horse in	
21	three consecutive races), "Pick Four"	
22	(picking the winning horse in four	
23	consecutive races), and a "Pick Six"	
24	(picking the winning horse in six	
25	consecutive races.)	
26	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
27	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
28	are indeed <b>wagers</b> when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
	racetrack.	
	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	only took place live (at the actual track	
	where the race was being run), such that	
	bettors had to attend the race to place a	
	wager.	
	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers	
	at locations other than the track where	
	the race was being run.	
	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
	which was explicitly intended to	
	"regulate interstate commerce with	

1	respect to wagering on horseracing.” As	
2	provided therein, no one “may accept an	
3	interstate off-track wager except as	
4	provided in” the IHA.	
5	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
6	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No.
7		62-6.
8	112. From the late 1990’s through today,	Daruty Dec., ¶ 14.
9	the industry has experienced much	
10	growth in the area of Advanced Deposit	
11	Wagering (“ADW”).	
12	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
13	with a licensed, regulated	
14	online/telephone wagering operator, and	
15	then issues wagering instructions (via	
16	telephone or internet) to that operator to	
17	place a wager on a specific race using	
18	funds in the account.	
19	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
20	winning funds are deposited directly into	
21	the customer’s account.	
22	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
23	interstate wagers on horseraces by an	
24	entity (including an ADW operator),	
25	which has obtained consent from, <i>inter</i>	
26	<i>alia</i> , the host racing association on whose	
27	racetracks such wagers are placed, such as	
28	Plaintiffs.	
	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
	required consent only if it receives a	
	payment of money or other value from	
	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
	(Gulfstream Park and Gulfstream Park	
	West), Maryland (Pimlico and Laurel	
	Park), and Oregon (Portland Meadows).	

119. Each Plaintiff is a Host Racing Association within the meaning of the IHA.	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
120. Each Plaintiff has the approval of its host State to conduct racing.	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
121. Each Plaintiff has a written agreement with its Horsemen's Group, as required by the IHA.	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
122. No Plaintiff has ever provided consent to Defendant to accept a wager on a race run at any of Plaintiffs' race tracks.	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
123. No Plaintiff has ever provided consent to Defendant to accept a wager from a resident of the States of California, Florida, Maryland or Oregon.	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
124. No Plaintiff has ever received any money from Defendant with respect to wagers (or entry fees) accepted by Defendant	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
125. Defendant does not have any agreements with any of the Plaintiffs.	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
126. Defendant has never requested nor received consent from any Plaintiff to accept wagers on races run at the Plaintiffs' race tracks.	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
127. Defendant has never requested nor received consent of any host racing commission to accept wagers on Plaintiffs' races.	Midland Depo., 211:24-212:7, <u>Docket</u> No. 62-7.
128. Defendant has never requested nor received consent from any off-track racing association to conduct its contests.	Midland Depo., 212:8-11; 213:2-5, <u>Docket</u> No. 62-7.
129. In response to New York's DFS legislation Derby Wars stopped accepting entry fees from residents of New York,	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A; Midland Depo., 353:19-354:5; 485:13-25.
130. Every visitor to the Derby Wars website has access to the leaderboards, a display of other participants' selections, and a graphic that displays how many people selected each horse, without	Ellis Dec. Opp. to MSJ, ¶7.

1	paying an entry fee.	
2	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
3	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
4	no other source of revenue for the Derby	
5	Wars contests.	
6	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
7	model is that the cash prize in a contest	Midland Depo., 149:1-5.
8	must be less than the cash entry fees.	
9	133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
10	wager from a resident of California,	
11	Florida, Maryland or Oregon, the host	
12	racing association in that state receives a	
13	payment as its “Market Access Fee” or	
14	“Source Market Fee.”	
15	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, <u>Docket</u> No. 62-
16	DerbyWars.com website.	5.
17	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
18	continually operated these contests on a	Midland Depo., 124:24-125:1.
19	daily basis since 2011.	

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